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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Application Number: 10/737,060

Filing Date: 12/16/2003

Applicant(s): Thomas J. Dinger and Fernando Salazar

Entitled: CATEGORIZING AND SHARING LEARNING OBJECTS

Examiner: Kang Hu

Group Art Unit: 3714

Attorney Docket No.: LOT920030029US1 (7321-014U)

TRANSMITTAL OF APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Submitted herewith is Appellant's Appeal Brief in support of the Notice of Appeal filed concurrently herewith and in response to the New Non-Final Office Action mailed April 28, 2009. This Appeal Brief has been timely filed within the statutory period to provide an Appeal Brief from the date of the Notice of Appeal and any required fees for an extension of time under 37 C.F.R. § 1.136 are provided herewith. Notwithstanding, please charge any shortage in fees due under 37 C.F.R. §§ 1.17, 41.20, and in connection with the filing of this paper to Deposit Account 12-2158, and please credit any excess fees to such deposit account.

Date: July 28, 2009

Respectfully submitted,

/Steven M. Greenberg/
Steven M. Greenberg, Registration No. 44,725
Customer Number 46321

PATENT

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APPEAL BRIEF

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Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed concurrently herewith, wherein Appellants appeal from the Examiner's rejection of claims 1 through 19.

I. REAL PARTY IN INTEREST

This application is assigned to International Business Machines Corporation by assignment recorded on December 16, 2003, at Reel 014809, Frame 0893.

II. RELATED APPEALS AND INTERFERENCES

Appellant is unaware of any related appeals and interferences.

III. STATUS OF CLAIMS

Claims 1 through 19 are pending in this Application and have been four times rejected. It is from the multiple rejections of claims 1 through 19 that this Appeal is taken.

IV. STATUS OF AMENDMENTS

Claims 1, 9 and 17 were amended once in the Amendment filed on August 31, 2007 (the "First Amendment") in response to the Non-Final Office Action dated May 31, 2007 (the "First Non-Final Office Action") and a second time in the Amendment filed on February 6, 2009 (the "Second Amendment") in response to the Non-Final Office Action dated August 6, 2008 (the "Second Non-Final Office Action"). Otherwise, Claims 2 through 8, 10 through 16 and 18 through 19 have not been amended previously and their original form as of the filing date of the Application of December 16, 2003.

V. SUMMARY OF CLAIMED SUBJECT MATTER

By reference to paragraph [0016] of Appellants' published specification, independent claims 1, 9 and 17 are respectively directed to a method for finding, managing and sharing learning materials in a learning management system (LMS), a machine readable storage having stored thereon a computer program for administering learning objects within an LMS, and a system for finding, managing and sharing learning materials in an LMS. In the Appellants' invention, a user of the LMS, otherwise referred to as a "learner", can select from various learning materials in an LMS, otherwise known as "learning objects." To be able to easily retrieve, manage, and share these materials, the learner can aggregate selected learning objects into an ad-hoc category or "learning folder", which is established on the LMS separately from an

existing catalog of learning objects. The learner can further create and delete learning folders, and can add or remove learning objects to and from the folder. Even yet further, a user can allow other learners on the system to access the folder by establishing a "learning link" for the folder. Each learning link can then specify which other learners can access the learning folder.

With specific reference to claim 1, claim 1 as amended recites a method of administering learning objects within an LMS. The method includes establishing within a computing system a learning folder for a particular learner in the LMS which is separate from an existing course catalog of learning objects. (Par. [0018] and [0019]) In particular, the learning folder includes a configuration to aggregate access to existing learning objects from a separate course catalog. (Par. [0019]) The method also includes adding within the computing system one or more of the learning objects to the learning folder. (Par. [0019]) Finally, the method includes initially limiting access to the learning folder within the computing system to the particular learner. (Par. [0021])

With specific reference to claim 9, claim 9 as amended recites a machine readable storage having stored thereon a computer program for administering learning objects within a learning management system. The computer program includes a routine set of instructions which when executed by the machine cause the machine to establish within the computing system a learning folder for a particular learner in the LMS which is separate from an existing course catalog of learning objects. (Par. [0018] and [0019]) Again, the learning folder includes a configuration to aggregate access to existing learning objects from a separate course catalog. (Par. [0019]) The routine set of instructions when executed by the machine further cause the machine to add within

the computing system one or more of the learning objects to the learning folder. (Par. [0019]) Finally, the routine set of instructions when executed by the machine yet further cause the machine to initially limit access to the learning folder within the computing system to the particular learner. (Par. [0021])

With specific reference to claim 17, claim 17 as amended recites an LMS. The LMS includes learning objects disposed within a catalog in a computing system and learners configured to access the learning objects within the computing system. (Par. [0018] and [0019]) The LMS also includes a learning folder management user interface within the computing system through which particular ones of the learners can establish learning folders. (Par. [0009] and [0018]) Importantly, each of the learning folders aggregates selected ones of the learning objects separate and apart from an existing course catalog of learning objects. (Par. [0011] and [0019])

VI. ISSUES TO BE REVIEWED ON APPEAL

Claims 1 through 8 and 17 through 19 have been rejected under 35 U.S.C. § 101.

Claims 1, 3, 4, 9, 11, 12 and 17 have been rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent Application Publication No. 2002/0188583 A1 by Rukavina (“Rukavina”).

Claims 2, 5 through 8, 10, 13 through 16, 18 and 19 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Rukavina in view of United States Patent Number 6,988,138 B1 by Alcorn et al. (“Alcorn”).

VII. THE ARGUMENT

THE REJECTION OF CLAIMS 1 THROUGH 8 AND 17 THROUGH 19 UNDER 35 U.S.C. § 101

On page 3 of the New Non-Final Office Action, Examiner alleges that Appellants' method claims 1 through 8 and system claims 17 through 19 recite non-statutory subject matter, with respect to Appellants' method claims 1 through 8, the Court of Appeals for the Federal Circuit recently clarified the bounds of patent-eligible subject matter for process claims.¹ The Bilski court found the machine-or-transformation test the applicable test for determining patent eligibility of a process under § 101.² The Bilski court, in following the Supreme Court, enunciated the machine-or-transformation test as follows: "A claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing."³

As to the transformation branch of the Bilski inquiry, however, the court explained that transformation of a particular article into a different state or thing "must be central to the purpose of the claimed process."⁴ As to the meaning of "article," the court explained that chemical or physical transformation of physical objects or substances is patent-eligible under § 101.⁵ The court also explained that transformation of data is sufficient to render a process patent-eligible if the data represents physical and tangible objects, i.e., transformation of such raw data into a particular visual depiction of a physical object on a display.⁶ The court further noted that transformation of data is insufficient to render a process patent-eligible if the data does not

¹ See In re Bilski, 545 F.3d 943 (Fed. Cir. 2008) (en banc).

² Id. at 956.

³ Id. at 954 (citing Benson, 409 U.S. at 70 (1972)).

⁴ Id. at 962.

⁵ Id.

⁶ Id. at 963.

specify any particular type or nature of data and does not specify how or where the data was obtained or what the data represented.⁷

Appellants' method claims recite a method of administering learning objects within a learning management system. For the convenience of the Honorable Board, claim 1 as amended is reproduced herein as follows:

1. A method of administering learning objects within a learning management system, comprising the steps of:
 establishing within a computing system a learning folder for a particular learner in the learning management system (LMS) which is separate from an existing selection of learning objects, the learning folder comprising a configuration to aggregate access to learning objects from the separate existing selection of learning objects;
 adding within the computing system one or more of the learning objects to the learning folder; and,
 initially limiting access to the learning folder within the computing system to the particular learner.

Clearly, claim 1 as amended recites both an apparatus tied to the essential claim steps of the method claim (the "computing system") and also a transformative effect evident from the creation of a folder in the computing system for a particular learner, the addition to that folder of one or more learning objects, and the initial limitation of access imposed in the computing system upon a particular learner. More particularly, a transformation of data is apparent in claim 1 that is representative of real world objects--namely course content and particular learners. Thus, under In re Bilski, claim 1 and its dependencies clearly resolve to statutory subject matter.

As to claims 17 through 19, under § 101, there are four categories of subject matter that are eligible for patent protection: (1) processes; (2) machines; (3) manufactures; and (4) compositions of matter.⁸ But even if a claim fits within one or more of the statutory categories, it

⁷ Id.

⁸ 35 U.S.C. § 101.

may not be patent eligible.⁹ “Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work.”¹⁰ Importantly, “a machine is a concrete thing, consisting of parts, or of certain devices and combination of devices. This includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.”¹¹

With respect to Appellants' system claim 17, it is important to note that a learning management system (LMS), when interpreted in light of Applicants' specification is a machine—one of the statutory categories of subject matter under § 101. In fact, claim 17 expressly recites learning objects amongst an existing selection of learning objects disposed within a computing system, learners configured to access the learning objects within the computing system, and a learning folder management user interface within the computing system through which particular ones of the learners can establish learning folders. Appellants' specification at paragraph [0015] indicates that an LMS includes a server coupled to client computing devices over a computer communications network and that the server includes a database management system and various logic. Paragraph [0022] of Appellants' specification further indicates that a typical combination of hardware and software could be a general purpose computer system with a computer program that, when being loaded and executed, controls the computer system such that it carries out the methods described herein. The USPTO has consistently found that based on this functionality, a claim that recites a “computing system” comports with the definition of a

⁹ *In re Ferguson*, 558 F.3d 1359, 1363 (Fed. Cir. 2009).

¹⁰ *Id.* (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (*internal quotation marks omitted*))

¹¹ *Id.* at 1364 (quoting *In re Nuijten*, 500 F.3d 1346, 1355 (Fed. Cir. 2007), *reh'g denied en banc*, 515 F.3d 1361 (Fed. Cir. 2008), and *cert. denied*, 129 S. Ct. 70 (2008))

“machine,” namely “a concrete thing, consisting of parts, or of certain devices and combination of devices . . . [that] includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.”¹² Thus, Appellants respectfully submit claims 17 through 19 are statutory under 35 U.S.C. § 101.

THE REJECTION OF CLAIMS 1, 3, 4, 9, 11, 12 AND 17 UNDER 35 U.S.C. § 102

On page 3 of the New Non-Final Office Action, Examiner rejects claims 1, 3, 4, 9, 11, 12 and 17 under 35 U.S.C. § 102(b) as being anticipated by Rukavina. For the convenience of the Honorable Board, claims 3 and 4 stand or fall with claim 1, and claims 11 and 12 stand or fall with claim 9.

The factual determination of anticipation under 35 U.S.C. § 102 requires the identical disclosure, either explicitly or inherently, of each element of a claimed invention in a single reference.¹³ Moreover, the anticipating prior art reference must describe the recited invention with sufficient clarity and detail to establish that the claimed limitations existed in the prior art and that such existence would be recognized by one having ordinary skill in the art.¹⁴ Absence from an allegedly anticipating prior art reference of any claimed element negates anticipation.¹⁵

¹² See e.g., *Ex Parte Verhaegh*, Appeal 2009-000128 (BPAI June 11, 2009).

¹³ *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997) (“To anticipate a claim, a prior art reference must disclose every limitation of the claimed invention, either explicitly or inherently”), *In re Rijckaert*, 9 F.3d 1531, 28 USPQ2d 1955 (Fed. Cir. 1993); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989); *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 894, 221 USPQ 669, 673 (Fed. Cir. 1984).

¹⁴ See *In re Spada*, 911 F.2d 705, 708, 15 USPQ 1655, 1657 (Fed. Cir. 1990); *Diversitech Corp. v. Century Steps Inc.*, 850 F.2d 675, 678, 7 USPQ2d 1315, 1317 (Fed. Cir. 1988).

¹⁵ *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571 (Fed. Cir. 1986)(emphasis added).

With respect, Examiner has not found nor expressed a finding in the New Non-Final Office Action of several claimed limitations of claims 1, 9 and 17 in Rukavina thus negating anticipation thereby.

Specifically, exemplary claim 1 recites a method of administering learning objects within a learning management system. Again for the convenience of the Honorable Board, claim 1 as amended is reproduced herein as follows:

1. A method of administering learning objects within a learning management system, comprising the steps of:
 establishing within a computing system a learning folder for a particular learner in the learning management system (LMS) which is separate from an existing selection of learning objects, the learning folder comprising a configuration to aggregate access to learning objects from the separate existing selection of learning objects;
 adding within the computing system one or more of the learning objects **to the learning folder**; and,
 initially limiting access to the learning folder within the computing system to the particular learner.

Clearly, claim 1 as amended requires (1) the establishment within a computing system of a "learning folder" (2) for a "particular learner" and (3) the "initial limitation" of access to the learning folder to the particular learner. None of the foregoing emphasized claim terms can be found in Rukavina.

Notwithstanding, on page 3 of the New Non-Final Office Action, Examiner alleges to have found all three foregoing limitations within three paragraphs of Rukavina: Paragraphs [0032], [0037] and [0072]. Specifically, Examiner stated:

Re claims 1, 9, and 17, Rukavina teaches a method of administering learning objects within a learning management system, comprising the steps of: establishing within a computer system a learning folder for a particular learner in the learning management system (LMS) which is separate from an existing selection of learning objects (¶30, custom assembly of learning objects for each student according to preference and ability - the learning objects are separate from existing selection of learning objects as they are customized for each student), the learning folder comprising a configuration to aggregate access to learning objects from the separate existing selection of learning objects (¶32, easily input externally provided course content into the system); adding within the computing system one or more of the learning objects to the learning folder

(¶37, assemble learning objects); initially limiting access to the learning folder within the computing system to the particular user (~ 72, individually created for the user).

At the outset, it will be apparent to the Honorable Board that Examiner has provided an express claim construction for the critical claim term "learning folder" as "assembly" and "initially limiting access" as "individually created". With respect, Examiner has failed to set forth a viable claim construction under the law.

In this regard, the term "learning folder" enjoys a broadest reasonable interpretation of "a folder of learning objects" on its face. Likewise, "initially limiting access to" means on its face, "at the beginning, restricting one's access to". Appellants' usage of both terms is entirely consistent with the plain meaning ascribed thereto. Specifically, at paragraphs [0018] and [0019] of Appellants' specification, Appellants stated:

[0018] In the example shown in FIG. 1, Learner A has created a **learning folder and has selected Learning Objects 1 and 2 to be placed in the folder**. The present invention allows a learner to categorize a learning object within the learning management system in an ad-hoc fashion, and not based on any specific characteristic of the learning object, other than perhaps the fact that the learner is interested in it and wants to have a quick way of accessing it again. Thus, there need be no particular relationship between Learning Objects 1 and 2. Learner A can select and remove learning objects from the folder at will.

[0019] In addition, a learner can create and remove "learning links" that can be associated with a learning folder. As used herein, a "learning link" can be any functionality or implementation bestowed on a particular learning folder by a learner so as to allow certain other learners to access and use the learning folder. One way of implementing a learning link could be by specifying in an access control list who could view and/or manage the folder. In the example shown in FIG. 1, Learner A has established a learning link and dictated that Learner N has access to the folder. Alternatively, Learner A could have allowed all N learners on the system to access the folder, instead of **limiting it to just one other learner**.

As set forth in M.P.E.P. 2111, "During patent examination, the pending claims must be given their broadest reasonable interpretation consistent with the specification. Specifically, the Federal Circuit's en banc decision in Phillips v. AWH Corp., 415 F.3d 1303, 75 USPQ2d 1321 (Fed. Cir. 2005) expressly recognized that the USPTO employs the "broadest reasonable interpretation"

standard.¹⁶ Examiner's improper claim construction of "learning folder" as "assembly" and "initially limiting access" as "individually created" exceeds the legal standard for claim construction during examination and inhibits Examiner's ability to properly compare the cited art to Appellants' claims.

It naturally follows that Examiner could not have and has not located within Rukavina all teachings recited by Appellants in claims 1, 9 and 17. Specifically, the cited portions of Rukavina are reproduced herein for the convenience of the Honorable Board:

[0032] Content editor 115 allows the developer to easily input externally-provided course content 107 into the system 100, even without having specialized programming knowledge. Course content might comprise text, audio clips, video clips, animation, Flash technology, etc. Although not explicitly shown, these various components of a course's content can be authored by a plurality of developers working simultaneously at a plurality of workstations; that is, a graphic designer might author various graphics, while a subject matter expert might author various sections of text. In this way, course content can be authored in parallel, so that courses can be developed as rapidly as possible.

[0037] Specifically, dynamic delivery tool 135 loads objects 125 upon a request for a course from a student operating at workstation 165 through network 170, which may be the Internet. Thereafter, rendering engine 140 decides which of the objects 125 will be delivered to the student at workstation 165, based upon information pertaining to that student contained within LMS 145. For example, rendering engine 140 might determine which objects 125 to assemble and deliver based on a semantic match, facilitated by semantic network 142 within dynamic delivery tool 135, between objects 125 and student information contained within LMS 145. Semantic network 142 can generally be thought of as a graph for demonstrating features and relationships of objects 125 to be used in matching to information within student profile 150.

[0072] In this way, a student may instantaneously receive a course that has been individually created for him or her. The student may thus attain a desired level of proficiency in the course subject matter in a minimum amount of time; that is, the student receives a course that presents only the required amount of information in a minimum amount of time.

A careful review of all three paragraphs of Rukavina will reveal the following facts:

¹⁶ The Patent and Trademark Office ("PTO") determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction "in light of the specification" as it would be interpreted by one of ordinary skill in the art." *In re Am. Acad. of Sci. Tech. Cir.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827 (Fed. Cir. 2004). Indeed, the rules of the PTO require that application claims must "conform to the invention as set forth in the remainder of the specification and the terms and phrases used in the claims must find clear support or antecedent basis in the description so that the meaning of the terms in the claims may be ascertainable by reference to the description." 37 CFR 1.75(d)(1).

Paragraph [0032] pertains only to the inputting of course content into a system and provides no indication of the use of "learning folders" for different learners that is separate from a course catalog. Paragraph [0037] teaches the loading of course objects responsive to a request and limited to a profile for a requesting student. Finally, paragraph [0072] teaches only the advantage of Rukavina of the instant receipt of a course that has been individually created for a learner.

Importantly, there is NO TEACHING IN PARAGRAPH [0072] of INITIALLY LIMITING ACCESS TO A LEARNING FOLDER TO A PARTICULAR LEARNER. Thus, Examiner's failure to articulate such a finding necessarily negates anticipation of claims 1, 9 and 17 under 35 U.S.C. § 102 by Rukavina.

THE REJECTION OF CLAIMS 2, 5 THROUGH 8, 10, 13 THROUGH 16, 18 AND 19

UNDER 35 U.S.C. § 103.

In as much as Examiner has not met the burden of establishing a prima facie case of anticipation with respect to Rukavina and to independent claims 1, 9 and 17, Examiner naturally has failed to locate all claimed aspects of claims 2, 5 through 8, 10, 13 through 16 and 18 through 19 in the combination of Rukavina and Alcorn.

Based upon the foregoing, Appellant respectfully submit that the Examiner's rejections under 35 U.S.C. §§ 101, 102(b) and 103(a) based upon the applied prior art are not viable. Appellants, therefore, respectfully solicit the Honorable Board to reverse the Examiner's rejections under 35 U.S.C. §§ 101, 102(b) and 103(a).

Date: July 28, 2009

Respectfully submitted,

/Steven M. Greenberg/
Steven M. Greenberg
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VIII. CLAIMS APPENDIX

1. (Previously Amended) A method of administering learning objects within a learning management system, comprising the steps of:

establishing within a computing system a learning folder for a particular learner in the learning management system (LMS) which is separate from an existing selection of learning objects, the learning folder comprising a configuration to aggregate access to learning objects from the separate existing selection of learning objects;

adding within the computing system one or more of the learning objects to the learning folder; and,

initially limiting access to the learning folder within the computing system to the particular learner.

2. (Original) The method of claim 1, further comprising the steps of:

establishing a learning link for the learning folder, which provides access to the learning folder for one or more additional learners.

3. (Original) The method of claim 1, further comprising the steps of:

modifying the learning folder by adding one or more additional learning objects to the learning folder.

4. (Original) The method of claim 1, further comprising the steps of:
modifying the learning folder by removing one or more learning objects from the learning folder.
5. (Original) The method of claim 1, further comprising the steps of:
modifying the learning link by adding access for one or more learners.
6. (Original) The method of claim 1, further comprising the steps of:
modifying the learning link by removing access for one or more learners.
7. (Original) The method of claim 1, further comprising the steps of:
removing a learning folder from the learning management system.
8. (Original) The method of claim 1, further comprising the steps of:
removing a learning link from the learning management system.
9. (Previously Amended) A machine readable storage having stored thereon a computer program for administering learning objects within a learning management system, the computer program comprising a routine set of instructions which when executed by the machine cause the machine to perform the steps of:
establishing within a computing system a learning folder for a particular learner in the learning management system (LMS) which is separate from an existing selection of learning

objects, the learning folder comprising a configuration to aggregate access to learning objects from the separate existing selection of learning objects;

adding within the computing system one or more of the learning objects to the learning folder; and,

initially limiting access to the learning folder within the computing system to the particular learner.

10. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

establishing a learning link for the learning folder, which provides access to the learning folder for one or more additional learners.

11. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

modifying the learning folder by adding one or more additional learning objects to the learning folder.

12. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

modifying the learning folder by removing one or more learning objects from the learning folder.

13. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

modifying the learning link by adding access for one or more learners.

14. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

modifying the learning link by removing access for one or more learners.

15. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

removing a learning folder from the learning management system.

16. (Original) The machine readable storage of claim 9, further causing said machine to perform the steps of:

removing a learning link from the learning management system.

17. (Previously Amended) A learning management system (LMS) comprising:
a plurality of learning objects amongst an existing selection of learning objects disposed within a computing system;

a plurality of learners configured to access the learning objects within the computing system; and,

a learning folder management user interface within the computing system through which particular ones of the learners can establish learning folders, each of the learning folders

aggregating selected ones of the learning objects separate and apart from the existing selection of learning objects disposed within the computing system.

18. (Original) The system of claim 17, wherein the learning management user interface comprises a configuration for limiting access to each one of the established learning folders to the particular one of the learners who created the learning folder.

19. (Original) The learning management system of claim 18, wherein the learning management user interface further comprises a configuration for permitting access to selected ones of the established learning folders for others of the learners by way of corresponding learning links.

IX. EVIDENCE APPENDIX

No evidence submitted pursuant to 37 C.F.R. §§ 1.130, 1.131, or 1.132 of this title or of any other evidence entered by the Examiner has been relied upon by Appellant in this Appeal, and thus no evidence is attached hereto.

X. RELATED PROCEEDINGS APPENDIX

Since Appellant is unaware of any related appeals and interferences, no decision rendered by a court or the Board is attached hereto.